

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD C. CADE)	
Claimant)	
VS.)	
)	Docket No. 1,047,387
DURHAM SCHOOL SERVICES)	
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent requested review of the June 19, 2012 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on October 19, 2012.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier. Due to a conflict, Board Member Gary R. Terrill, has recused himself from this appeal. Accordingly, Jeffrey King, of Salina, Kansas, was appointed as a Board Member Pro Tem in this case. Due to the retirement of Board Member David A. Shufelt, E. Lee Kinch, of Wichita, Kansas was been appointed as Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge adopted the findings of Dr. Fluter and Dr. Fevurly and found claimant to have a work-related permanent partial general disability of 81.5 percent.

The respondent requests review of whether claimant's injuries arose out of and in the course of his employment and of the nature and extent of claimant's disability. Respondent argues that claimant's present disability is causally related to an incident at home and not his work injury. Therefore, claimant should be awarded no more than a 10 percent functional impairment to the left leg with no impairment to the right lower extremity or the body as a whole. Should the Board determine claimant is entitled to a whole person impairment, respondent argues all of the task loss opinions should be averaged to determine the final disability.

Claimant argues he should be found to be permanently and totally disabled, or in the alternative, the Award should be affirmed.

FINDINGS OF FACT

Claimant's date of accident is April 6, 2007, and each and every day worked through February 27, 2009, involving injuries to both of claimant's knees, his right hip and back.

Claimant began working for respondent in 1997. On April 6, 2007, claimant tripped over a rug while in the office bathroom of Durham High School, striking his head and injuring his left knee. Claimant reported the accident and was instructed to seek medical attention. The next day, claimant went to the hospital and was examined. He was told that his head was alright but he had sprained a muscle in his left leg at the knee. Claimant admits to having preexisting arthritis in his left knee and he suffered a prior injury to the left knee in a car wreck four years before, resulting in a torn meniscus. Claimant was off work for a while after this April 6, 2007, accident and was given temporary restrictions. After receiving treatment, claimant was able to return to his regular duties, although the exact date of his return is not in this record. Respondent admitted this accident.

After returning to work, claimant experienced buckling in his left knee and he had to shift his weight to the right leg, which caused his right knee, hip and back to hurt. Since his 2006 vehicle accident, claimant has had to use a cane to help with his balance while he works.

Claimant alleges he suffered an additional injury on February 27, 2009, after his left leg got caught under him in the steps of a school bus. He had to have assistance to pry himself loose of the steps. Claimant completed an accident report even though he felt that he was all right and would heal. He did not seek medical attention for the February 2009 accident until June 2009, at which time claimant also reported he had been experiencing right hip pain for about three weeks. The accident report indicated claimant injured his right knee, rather than the left knee.

Claimant did not work from February 2009 to August 2009, due to a family problem. Claimant's father was dying and he wanted to spend what time he had left with him. While claimant was spending time with his father, he fell in the bathroom after his right leg gave

out. Claimant's condition continued to worsen to the point he began using two canes to ambulate.¹

Claimant returned to work for respondent at the beginning of the school year in August 2009. After completing route reviews and dry runs and as claimant was preparing to receive the children, Patricia Sherwood, respondent's general manager, recommended that claimant see a doctor. This was in part because when claimant returned to work he was using two canes to ambulate instead of one. Claimant met with the doctor, was evaluated, and told that he did not pass the required DOT physical. Claimant's last day of work was August 14, 2009. A month later, claimant was informed that his employment with respondent had been terminated.

Claimant has had knee problems since at least 1992. Claimant's original knee problems were attributed to arthritis. Over time, claimant developed increased problems with his knees, and right hip and issues with his back as a result of gait problems. The incidents in 2007 and 2009 have aggravated those problems. Claimant tried to work through his problems, but now everything he does aggravates his conditions.

Patricia Sherwood, one of claimant's supervisors, denies ever receiving anything from claimant in writing stating that he was filing a workers compensation claim. However, claimant's employee file shows that he filed an injury report on April 6, 2007, for injuries sustained while walking out of a bathroom at work and tripping over a rug. Claimant reported another incident that took place at his home on April 9, 2007, when he was walking to the bathroom and ran into a dresser and almost fell down. Claimant felt that this second incident occurred because his leg was weak from the work incident on April 6. Claimant was sent for medical treatment at the Prism Occupational Health Network.

Claimant did not have another accident until the February 27, 2009, bus incident. He declined medical treatment until July 27, 2009. Ms. Sherwood noticed claimant having trouble with his knees before the February 27, 2009 incident and he had been wearing a left knee brace while he worked. Claimant's employment was terminated because he couldn't pass the required DOT physical administered in August 2009. The failure was due in part to his use of two canes to get around and his inability to step into his bus while using the canes. Claimant had passed all prior DOT physicals including the one on June 1, 2009.²

Ms. Sherwood testified that claimant indicated he wanted to continue working if he could. He had been working for the company since 1997 and was considered to be a good

¹ R.H. Trans. at 9-10.

² Sherwood Depo. at 18.

employee. But his inability to pass the physical made it impossible for him to continue driving for the company.

Jennifer Adams worked for respondent from 1992 to 2000 as a school bus driver and then from 2000 to May 2010 as a safety manager on the streets. As a safety manager, Ms. Adams was responsible for taking workers compensation claims and was responsible for investigating all bus accidents on the streets and any general safety issues.

On February 27, 2009, Ms. Adams and claimant filled out a Supervisor's Report of Employee Work Injury³ identifying claimant's accident on that date. The report stated claimant suffered an injury to his *right* lower extremity. Claimant had initially reported the incident to his supervisor, Ms. Sherwood, who then notified Ms. Adams, who contacted claimant and obtained a statement about what happened and what body part was injured. Once the paperwork was completed the workers compensation adjusters were contacted and the incident reported.

At the time claimant's accident was reported, Ms. Adams asked claimant if he required medical attention and he said no.⁴ Claimant was instructed to be more careful of where and how he stepped. Claimant later sought medical attention in July 2009, as his knee was not getting better. However, the July 2009 treatment focused on claimant's left knee, not the right. Ms. Adams was not aware if claimant actually sought medical attention through the emergency room the day after the February 27 accident.

Ms. Adams testified that before anyone can drive one of respondent's buses they must first pass the DOT physical. She did not recall a specific time, but she was aware that claimant used a cane or canes to get around during his employment with respondent.⁵

Ms. Adams was not aware of claimant's prior injuries, despite the fact that he had injured the same knee two years before. She testified that she tends to not know peoples' prior injuries, but if she had known she would have pulled the prior report and looked it over.

Q. And with regard to injuries reported to this employer, are you aware that he had an injury two years preceding the 2-27-09 incident?

A. I wouldn't have known that, no.

³ P.H. Trans. (Nov. 10, 2009), Cl. Ex. 2 at 1.

⁴ Adams Depo. at 9.

⁵ *Id.* at 18.

Q. Why not?

A. Because I tend to not know peoples' prior injuries.

Q. Well, you're the Safety Manager; correct?

A. I handle Work Comp aspects.

Q. Well, would you review the prior Work Comp injuries of somebody if they reported that they had been injured in the past, or not, and specifically with regard to Richard Cade's case.

A. If I had known he had a prior injury, I probably would have went and pulled out the report and looked it over, but to my knowledge, I'm not aware of that at this time.

Q. Excuse me. But he told you yes; correct?

A. Right, but that could have been injured anywhere, any time.

Q. So you're not aware that he had a prior left knee injury on the job?

A. To my knowledge, yes.

Q. So you knew he had a prior left knee injury before this incident occurred on 2-27-09?

A. No.⁶

She later testified that she was aware of claimant reporting an injury to his left knee in April 2007 and that he declined medical treatment at the time. Ms. Adams testified that Kim Grandon, the other safety manager at the time, likely handled this claim and that is why she is not sure of the details.

If an employee needed to see a doctor for an injury on the job, they would be sent to Via Christi Occupational Medicine Clinic for evaluation. When claimant was sent to the clinic he met with Dr. Brown, who was asked to evaluate claimant's left knee.

Based on the information she had available to her, claimant's 2007 injury was to the left knee and the 2009 injury was to the right knee.⁷ Ms. Adams does not believe that claimant injured only the left knee on both occasions, because the paperwork she filled out

⁶ *Id.* at 21-22.

⁷ *Id.* at 38-39.

for the 2009 accident identifies the right knee. She testified that there is no way she made a mistake and put down the wrong knee.

Osteopathic family practice physician Dr. Linus Ohaebosim has been claimant's family physician since January 25, 1990. Dr. Ohaebosim's medical records on claimant display a history of bilateral knee pain. At the first examination, claimant weighed 285 pounds and stood 6' 3" tall. Claimant's left knee issues began in 1992, with swelling and tenderness. In 1994, claimant again displayed left knee pain. Claimant was diagnosed with degenerative joint disease and was instructed not to take part in strenuous exercises. His weight had increased to 319 pounds. By March 2002, claimant's weight had increased to 335 pounds and his left leg was swelling. In July 2002, his left hip popped out of place and he had developed pain in his right knee. In March 2003, he threw his back out while washing buses and his left leg went dead for 5-6 seconds. A January 2004 report indicated claimant fell, injuring his leg, with resulting tenderness in the left knee.

On January 10, 2005, claimant appeared with bilateral knee pain, hardly able to walk. His weight had increased to over 340 pounds. After bilateral x-rays were taken, he was diagnosed with mild osteoarthritis in the right knee. In April 2005, claimant was in a car accident and injured his right knee. On May 16, 2005, claimant appeared with left knee pain which was treated with an injection. The medical notes indicate claimant fell when his knee gave out on him. An MRI of the left knee was performed on June 20, 2005, displaying a torn ligament in the left knee. Physical therapy notes indicate treatment of a damaged **left** knee from a motor vehicle accident, which contradicts earlier notes. On March 8, 2006, claimant received an injection in the right knee.

A June 1, 2007, entry indicated swelling in the left knee after claimant fell when the knee gave out on him. Claimant was evaluated for his continued bus driving duties and found capable of continuing in that job. The December 11, 2008, entry displayed knee problems with swelling and degenerative joint disease in the left knee. On June 1, 2009, claimant underwent a DOT physical and passed. On July 14, 2009, claimant was diagnosed with right hip arthritis.

The problems from claimant's prior accidents persisted over the years, but he was still able to drive a school bus. However, by 2009 claimant's knee problems severely limited his ability to walk without some kind of assistance. But, as noted above, he was cleared to operate a bus effective June 1, 2009.

Claimant was referred by respondent to board certified internal medicine specialist Chris D. Fevurly, M.D., for an examination on December 2, 2011. Claimant's complaints at the time were pain in the right hip and right buttocks, worse at night. Claimant reported that his right hip felt like it locks up and his right leg would go numb on occasion. Claimant associated the right leg pain with his right hip issues. Claimant believed his hip pain was due to overcompensation with the right leg prior to his left knee replacement. Claimant also had complaints of occasional and moderate low back pain, aggravated by prolonged

walking and right knee pain from prolonged standing and walking. Claimant could not squat or kneel and struggled with climbing. Claimant was presented with the option of surgery or an injection to attempt to relieve the pain. Claimant chose a left knee replacement. Claimant's left knee was better post surgery.

Claimant presented as a obese⁸ male, weighing 340 pounds, who had difficulty staying steady on his feet. The history provided to Dr. Fevurly included the accident on April 4, 2007, when claimant fell at work hitting his head and left knee. The history also indicated an injury to claimant's left knee when he fell in the stairway of the bus on February 27, 2009. Claimant reported a worsening of his left knee after this later fall when he returned to work. The history also indicates an onset of right hip pain after the later accident.

Upon examination, Dr. Fevurly determined claimant had degenerative joint disease in both knees, worse on the left, chronic right hip and upper leg pain, advanced lumbar spondylosis, MRI findings of lumbar stenosis and lateral recess stenosis, morbid obesity, type 2 diabetes, hypertension, and chronic recurrent UTIs accompanied by incontinence.⁹

Dr. Fevurly opined that claimant's bilateral knee degenerative arthritis preexisted the work events of April 4, 2007 and February 27, 2009. The work events aggravated the degenerative joint disease, but were not prevailing factors in the progression of the osteoarthritis.¹⁰ He indicated in his report that the major factor affecting claimant's knee arthritis was his body mass index. He went on to find that claimant's low back pain and right hip pain are the probable result of the underlying spondylosis and the effect of his antalgic gait over the last several years. He opined claimant's right knee arthritis is not advanced enough to require a total knee replacement.

Dr. Fevurly found claimant to be at maximum medical improvement from any aggravation of the knees, right hip or low back. He went on to assign the following permanent impairments: for the left knee, 37 percent with 27 percent preexisting, leaving a 10 percent left lower extremity impairment (4% whole person); for the right knee, 25 percent to the right lower extremity with 20 percent preexisting leaving a 5 percent right lower extremity impairment (2% whole person) related to the work events outlined; for the low back and right hip pain a 5 percent whole person impairment. Combined, these impairments total an 11 percent impairment to the whole person.¹¹ Dr. Fevurly testified this

⁸ Claimant stands 6' 3" inches tall and weighs 340 pounds with a BMI of 36-37.

⁹ Fevurly Depo., Ex. 2 at 8 (Dr. Fevurly's IME report dated Dec. 2, 2011).

¹⁰ *Id.*

¹¹ *Id.*, Ex. 2 at 9 (Dr. Fevurly's IME report dated Dec. 2, 2011).

whole person impairment is related to the February 2009 accident.¹² Dr. Fevurly agreed that, with the information that he had at the time of the examination, if someone disagreed with him and said all of claimant's knee arthritis was preexisting, he wouldn't have much argument with that.¹³

Dr. Fevurly found claimant qualified to perform at the sedentary work level because of the left knee replacement. He acknowledged claimant would someday need a total right knee replacement, but required no further surgery for the left knee, lumbar spine or right hip. He didn't feel claimant's left knee replacement was the result of claimant's work injury.¹⁴ Dr. Fevurly reviewed the task list of vocational expert, Steve Benjamin and determined that claimant could no longer perform 19 out of 30 tasks for a 63.3 percent task loss.¹⁵

Claimant met with internal medicine specialist Val Brown, Jr., M.D., on July 27, 2009, for a February 27, 2009, injury to his left knee. The history provided indicated claimant injured his left knee rather than the right knee in the bus accident. Claimant also had complaints of right hip pain and right knee pain. He presented with a poor gait, using a cane. Claimant reported struggling with left knee pain since his fall off the bus in February 2009. Claimant indicated his right hip pain had been going on for three weeks. However, the hip pain improved after claimant received an injection from his family doctor. But it was made worse after he fell at home while going to the restroom at night. Dr. Brown described claimant, in his report, as an obese male with poor movement. Claimant used an assistive device to get around. Both knees were swollen and claimant wore braces on both knees.

Claimant was diagnosed with bilateral knee pain and right hip pain. Dr. Brown noted that claimant had a prior left knee injury from a car accident and most likely continues to suffer from that incident. He had no knowledge of claimant complaining of right hip pain prior to the work injury. Claimant was released to work with the temporary restriction of wearing a fresh knee brace to help support his weight. He felt that claimant should undergo essential functioning testing to determine if he were fit to continue his work as a bus driver. Dr. Brown provided no opinion on impairment or permanent restrictions.

At the request of respondent, claimant met with board certified neurological surgeon Paul S. Stein, M.D., for an examination on December 4, 2009. Claimant's complaints were pain in the lower back and right hip, persistent pain in the both knees, pain with standing

¹² *Id.* at 17.

¹³ *Id.* at 33.

¹⁴ *Id.* at 19, 34.

¹⁵ *Id.* at 23-24.

for more than a few minutes, and the need for two canes to walk. Claimant voiced his concern about being able to perform his job because he was providing care to his elderly mother. The history provided to Dr. Stein discussed the injuries in April of 2007 and an undated injury in a school bus to claimant's left knee.

Dr. Stein found claimant, a morbidly obese man, to have difficulty ambulating even with two canes. An MRI of both knees was ordered to confirm the need for total knee replacement. An MRI was also ordered of the lumbar spine. X-rays were ordered of the low back and the hips, with flexion-extension and oblique views.

In his report of December 31, 2009, Dr. Stein noted the MRI of the lower back showed some mild degenerative changes consistent with claimant's age and body habitus and some stenosis. The MRI of the knees showed a lot of degenerative change, a possible meniscus tear in the right knee and possible ligament tear on the left side. Dr. Stein opined that claimant's primary problems seemed to be his knees.

Dr. Stein was asked to give his opinion on the cause of claimant's complaints and need for treatment. He opined that the degenerative disease in claimant's knees was preexisting and was not caused by his work for respondent or the specific incidents at respondent. However, the incidents represented aggravations of the degenerative disease, and accelerated the need for the total knee replacement.

Claimant met with board certified orthopedic surgeon, Anthony A. Pollock, M.D., for the first time on January 19, 2010, at the request of the insurance company. Claimant presented with complaints of bilateral knee pain, but denied specific injury to his knees. Claimant reported having knee pain for years and that he had been terminated for no longer being able to do his job.

Dr. Pollock found claimant to lack full extension of both knees by about 5 to 10 degrees. Claimant showed evidence of crepitance, swelling in the right knee and discomfort with hip flexion. Dr. Pollock diagnosed claimant with severe degenerative arthritis in both knees and felt that claimant would eventually require bilateral total knee arthroplasties. Dr. Pollock told claimant this surgery would allow him to return to his regular job or at least to some degree of work.¹⁶ Claimant had surgery on October 20, 2010, consisting of a left lower extremity total knee arthroplasty. Within two weeks claimant was reporting much improvement, with increased range of motion, including ambulating down stairs. By December 7, 2010, claimant was ready for physical therapy. However, claimant's improvement had slowed, in part due to his right knee problems. Claimant also reported low back pain, which Dr. Pollock determined was probably secondary to his gait pattern.

¹⁶ Pollock Depo. at 9.

At the February 15, 2011, examination claimant's left knee displayed good progress, with almost full extension and 110 degrees of flexion. Claimant was released to light sedentary work and advised to walk for an hour maximum at a time followed by four hours sitting. Dr. Pollock determined that claimant had reached MMI as of that date. Claimant was rated at 37 percent to the left lower extremity and 25 percent to the right lower extremity, pursuant to the AMA Guides 4th ed.¹⁷

Dr. Pollock opined that claimant's left leg impairment was a combination of the work injury in February 2009 and the previous osteoarthritis.¹⁸ He attributed 10 percent of the left leg impairment to the work injury. He had no opinion regarding claimant's hip or low back impairments. Dr. Pollock reviewed the task list of Steve Benjamin and opined that claimant had lost the ability to perform 20 out of 30 tasks for a 66.7 percent task loss.

Dr. Stein met with claimant again on May 10, 2011. Claimant continued to have discomfort in his low back. Physical therapy was recommended for six weeks. Dr. Stein opined that other than weight reduction he was not certain there was more treatment for claimant's low back.

On July 12, 2011, Dr. Stein found claimant to be at maximum medical improvement and assigned a 5 percent whole person functional impairment for claimant's low back injuries under DRE lumbosacral category II, pursuant to the AMA Guides, 4th ed., and deferred to Dr. Pollock regarding claimant's lower extremity ratings. Dr. Stein also recommended permanent work restrictions for the low back of no lifting more than 40 pounds very occasionally, 30 pounds occasionally; no repetitive bending and twisting of the lower back; standing, sitting, and walking per Dr. Pollock's recommendations.¹⁹

Dr. Stein had the opportunity to review additional medical records on claimant and opined that the additional records did not alter his opinion on causation regarding claimant's knees. He was unable to connect claimant's right hip complaints to his 2009 work accident. He was also unable to connect claimant's low back complaints to his work accidents. He agreed claimant did not report any problems with his lumbar spine prior to the last fall he had at work with respondent.

Dr. Stein reviewed two task lists and opined that for the task list of Steve Benjamin, claimant lost the ability to perform 17 out of 30 tasks for a task loss of 56.7 percent. After

¹⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

¹⁸ Pollock Depo. at 13.

¹⁹ Stein Depo., Ex. 2 at 4 (Dr. Stein's July 12, 2011 report).

reviewing the task list of Doug Lindahl, Dr. Stein stated claimant had lost the ability to perform 22 out of 40 tasks for a 55 percent task loss.²⁰

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist George G. Flutter, M.D., for an examination on October 8, 2009. Claimant complained of pain in his right lower back, right hip, right knee and left knee. Claimant provided a history of a motor vehicle accident approximately four years before resulting in a left knee injury. Additionally, claimant reported the bus incident in 2009 when he injured his left knee. Claimant told the doctor his right hip pain began that summer.

Dr. Flutter reviewed claimant's medical records, examined him and diagnosed claimant with status post work-related injury to the left knee; left knee pain; possible left knee internal derangement; right knee pain; right hip pain and low back pain. He opined that based on the information available and to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the reported work-related injury to the left knee. He opined that the changes in claimant's gait pattern resulted in pain symptoms affecting the right knee, right hip and lower back.

Dr. Flutter assigned the following restrictions: lifting, carrying, pushing and pulling up to 10 pounds occasionally and negligible weight frequently; limit bending, stooping and twisting to an occasional basis; avoid squatting, kneeling, crawling and ladder climbing; limit stair climbing to an occasional basis; avoid bus driving until ability to safely do so has been assessed.

In the September 30, 2011, report Dr. Flutter opined claimant had a 43 percent permanent partial impairment to the whole body. This is a combination of a 75 percent impairment to the left lower extremity (30% whole body); 20 percent to the right knee (8% whole body); 7 percent impairment right lower extremity for the right hip (3% whole body); 5 percent to the low back, 2 percent whole body for right-sided sacroiliac joint dysfunction and 1 percent whole body for left-sided sacroiliac joint dysfunction. His ratings were all pursuant to the AMA Guides, 4th ed. On December 3, 2011, Dr. Flutter issued a follow-up report which found claimant to be realistically unemployable and permanently and totally disabled from performing substantial and gainful employment. Dr. Flutter determined that claimant does not have the capacity to perform even sedentary level activities on a regular and consistent basis.

Dr. Flutter had the opportunity to review the task list of Doug Lindahl and opined that claimant could no longer perform 25 out of 40 tasks for a 62.5 percent task loss.

Dr. Flutter testified that degenerative changes take time to develop. So he doesn't know if the changes in claimant's knee preexisted the injury in February 2009 and if so, to

²⁰ *Id.*, Ex. 3.

what degree. But it is certainly possible that they preexisted the prior injury in February 2009. He also testified that he knows claimant's right hip pain began sometime in the summer of 2009, but he is not certain if it preceded the fall or started after the fall in the summer of 2009. He opined that the degenerative changes in claimant's low back that were found on the December 2009 MRI preexisted claimant's 2009 accident.

Dr. Fluter indicated that everything is tied to the initial injury to the left knee which caused a domino effect resulting in the 2009 symptoms involving the back, hip and right knee.²¹ Dr. Fluter agreed with Dr. Fevurly that the work accidents in April 2007 and February 2009 aggravated claimant's degenerative joint disease in the knee, but were not the prevailing factors in the progression of his osteoarthritis.

Claimant met with Dr. Daniel Lygrisse for a fitness for duty evaluation on August 14, 2009, at respondent's request. Dr. Lygrisse had performed a DOT physical on claimant in 2007. Claimant presented with pain in his knees and right hip. Dr. Lygrisse determined claimant needed a skill performance evaluation by the state of Kansas before he could evaluate claimant's ability to safely operate a motor vehicle and until then he should not drive. At the time of the August 14, 2009, evaluation claimant denied any back disorder.

Dr. Lygrisse's biggest concern for claimant with his job duties involved climbing steps into and out of the bus. The front steps are 17 inches from the ground and the emergency exit at the back is 36 inches off the ground. Dr. Lygrisse felt that performing vehicle inspections or having to evacuate passengers in case of emergency would be difficult for claimant.

Claimant met with vocational specialist Steven Benjamin on January 9, 2012 and January 20, 2012, for a vocational assessment at respondent's request. Mr. Benjamin identified 30 non-duplicated tasks that claimant has performed over the last 15 years and found claimant to have a 100 percent wage loss.

Mr. Benjamin ultimately found that, based upon the restrictions imposed by all of the doctors, claimant is limited to jobs he can perform in a seated position. He also opined that since claimant has been out of the labor market since August 2009, if he were to reenter now he would most likely earn wages at entry level, close to minimum wage. He could return to the open market in the following positions: small parts bench assembly, hand packager, van driver, telephone solicitor or order clerk. He testified that claimant is also limited more in that he is going to be restricted to his work station, which eliminates the small parts bench assembly and hand packager positions. Mr. Benjamin noted a second interview was required as claimant was unable to remember his past relevant work history

²¹ Fluter Depo. at 48, 60.

At claimant's attorney's request, vocational expert Doug Lindahl met with claimant on November 21, 2011, for a vocational evaluation. Mr. Lindahl opined that claimant was unable to return to any work he had done in the past and it would be problematic for claimant to find any work. The reason for the difficulty is that claimant has no sedentary level activity background. Mr. Lindahl identified 40 non-duplicated tasks that claimant has performed over the last 15 years. Mr. Lindahl noted claimant had difficulty recalling relevant work information.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.²⁴

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."²⁵

Claimant alleges two accidents in this matter. The first occurred on April 4, 2007, when claimant fell in the bathroom at work, injuring his head and left knee. Respondent

²² K.S.A. 44-501 and K.S.A. 44-508(g).

²³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

²⁴ K.S.A. 44-501(a).

²⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

initially denied the accident on April 4, 2007. However, an Employers Report of Accident, K-WC 1101-A was prepared on April 10, 2007 and filed on April 23, 2007, with the Division of Workers Compensation. Additionally, Ms. Sherwood acknowledged claimant filed an injury report on April 6, 2007, for the injuries sustained during the fall in the bathroom. Claimant has satisfied his burden of proving he suffered an accidental injury to his left knee on April 4, 2007, which arose out of and in the course of his employment with respondent. Additionally, it is noted respondent, in its submission letter to the ALJ, admitted in the stipulations that claimant had suffered an injury on or about April 4, 2007, and claimant met with personal injury by accident which arose out of and in the course of his employment with respondent.

There is also a dispute regarding the acknowledged accident on February 27, 2009. Claimant testified that he fell in the doorway of a bus, pinning his left leg. However, the contemporaneous records indicate it was his right leg that was actually pinned.

It is clear from this record that this claimant is not a good historian. He had difficulty remembering past jobs, which extremity was hurt on what date, which doctor provided treatment on what date and was less than helpful in creating his 15 year job/task list with the vocational experts. None of this appeared to be intentional. Rather it appeared claimant simply could not remember specific facts from his past.

The accident on February 27, 2009, was stipulated to by respondent at the regular hearing and in respondent's submission letter. The nature and extent of that accident is disputed. Additionally, respondent contends claimant's right lower extremity was aggravated when claimant fell at home in the summer of 2009. The Board finds claimant suffered a work-related accident on February 27, 2009, to his right lower extremity, which arose out of and in the course of his employment with respondent. The incident at home in the summer of 2009 occurred when claimant's right leg gave out on him.²⁶ Respondent contends this was an intervening non-work related accident. It appears more to be the result of claimant's right leg problems ongoing from the bus accident and the resulting degenerative problems.

Claimant has a long history of lower extremity problems, including degeneration as early as 1992 and after. Claimant suffered multiple falls, some in 2004, an automobile accident in 2005 or 2006 which caused permanent damage to his left knee, ongoing daily trauma from the labors of his job with respondent and difficulties stemming from his morbid obesity. Even standing 6' 4", claimant's weight, increasing over the years from 290 to over 350 pounds would stress his body. However, an employer takes a worker as it finds him.

Dr. Fevurly found claimant's bilateral knee degeneration to pre-exist the work accidents, but agreed that the work events aggravated the degenerative joint disease

²⁶ R.H. Trans. at 27.

bilaterally. He also found claimant's low back and right hip pain were probably the result of claimant's antalgic gait. Dr. Stein testified that the work incidents were aggravations of claimant's degenerative disease. Dr. Pollock attributed claimant's left leg impairment to a combination of the work injury and claimant's previous osteoarthritis. He agreed claimant's back pain was secondary to his gait pattern. Dr. Fluter diagnosed claimant with a multitude of problems. But, in his opinion, claimant's left knee stemmed from the work related accident with the gait pattern resulting in pain symptoms in the right knee, right hip and low back.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.²⁷

The Board acknowledges it is claimant's burden to prove the elements necessary to allow an award of benefits. In this instance, the overall record supports a finding that claimant suffered two specific accidents, to his knees while working for respondent, and a series of aggravations bilaterally, which also aggravated claimant's low back and right hip. The ALJ averaged the functional ratings of the various doctors, finding claimant suffered an 11 percent whole body functional impairment from the injuries suffered while working for respondent. The Board agrees and adopts that finding as its own.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.²⁸

Likewise, the ALJ evaluated and averaged the task loss opinions of Dr. Fluter and Dr. Fevurly, finding claimant suffered a task loss of 63 percent. It is undisputed this claimant is not working and therefore suffers a wage loss of 100 percent. An average of

²⁷ K.S.A. 44-510e(a).

²⁸ K.S.A. 44-510e.

claimant's task and wage loss results in a permanent partial general (work) disability award of 81.5 percent. The Board adopts that finding as its own, affirming the Award of the ALJ.

K.S.A. 44-510c(a)(2) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.²⁹

Claimant contends he is unable to perform any work and therefore should be found permanently and totally disabled. However, Dr. Fevurly gave claimant specific restrictions and opined claimant was capable of performing sedentary work. Dr. Stein gave claimant specific work restrictions but did not prohibit his return to work. Vocational expert Steve Benjamin listed several jobs claimant would be able to perform, even with his limited activity level and many restrictions. While this would not allow claimant to earn a comparable wage, it would allow claimant to return to work in the open labor market. Claimant has failed to prove that he is permanently and totally disabled, based upon this record.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has satisfied his burden of proving that he suffered personal injury by accident on April 4, 2007, and in a series thereafter, and another accident on February 27, 2009. The Award sets out findings and conclusions in detail and the Board adopts those as its own in so far as those findings and conclusions do not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 19, 2012, is affirmed.

²⁹ K.S.A. 44-510c(a)(2).

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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John D. Clark, Administrative Law Judge